Oil and Gas, Natural Resources, and Energy Journal

Volume 2 | Number 3
2016 SURVEY ON OIL & GAS

September 2016

Nebraska

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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 2 NUMBER 3

NEBRASKA

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I. Introduction

The following is an update on Nebraska's legislative activity and case law relating to oil and gas, and mineral law from August 1, 2015, to July 1, 2016.

II. Legislative Activity

A. Wind Energy

With the passage of Legislative Bill 824,[1] private renewable energy generation facilities, including wind farms, are now exempt from certain laws that currently regulate facilities generating electricity.[2] Under the new law, developers are no longer required to have a power purchase agreement, in which a customer agrees to buy most of a proposed facility's electricity, before the facility is built. Further, private developers are not required to prove that a new facility will not create stranded assets. Proponents of the bill argued that this change will allow developers to build more easily in the wind-rich state, which will in turn attract new development. The bill passed 34-10.

B. Hydraulic Fracturing

Legislative Bill 1082[3], which passed 48-0, adds disclosure and notice regulations and requirements on wastewater disposal wells generated by oil and gas operations, including hydraulic fracturing. Under the bill, commercial injection well operators are required to sample and analyze injected wastewater at least once a year. The results must be submitted to the Nebraska Oil and Gas Conservation Commission.[4]

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1. 2016 NEB. LAWS L.B. 824.

2. *Exemptions for private renewable energy companies proposed*, UNICAMERAL UPDATE (Jan. 28, 2015), http://update.legislature.ne.gov/?p=18207 (last visited Sept. 20, 2016).

3. 2016 NEB. LAWS L.B. 1082.

4. *Oil wastewater well reporting requirement passed*, UNICAMERAL UPDATE (Mar. 24, 2016), http://update.legislature.ne.gov/?p=19073 (last visited Sept. 20, 2016).

C. Public Power Agencies & Hedging

As an effort to allow agencies to maintain lower electricity prices, Legislative Bill 897[5] permits "any power-generating agency that operates in a regional transmission organization to participate in hedging transactions for fuel, power or energy."[6] These agencies are now authorized to "grant a foreclosable security interest in and a lien on such agency's commodity futures account contracts or funds used for such transactions in an amount not exceeding five percent of such agency's annual gross revenue averaged over the previous three calendar years."[7] The funds must be authorized by the agency's governing body and may only be used for the designated investments. The bill passed 48-0.

III. Case Law

Kobza v. Bowers[8]

In *Kobza v. Bowers*, the Kobzas and Bowerses owned adjacent residential lots, with the Kobza property lying immediately south of the Bowers property. A drainageway passed through the properties. The Kobza residence was built in 1990, and the Bowers residence was built in 1998 or 1999. After the Bowers residence was constructed, the Kobza basement started flooding. In an effort to alleviate the flooding, and with the Bowerses' permission, Kobza installed a sump pump, and then an underground dewatering well, which was connected to another piece of pipe running underneath the Bowers property. In 2008, the piping system failed twice and Kobza refused to repair it; instead, Kobza began discharging water at the property line, causing Bowerses' property to flood.[9] The Bowerses obtained a permit from the county and installed a second culvert, and also built an earthen berm and pipeline, which directed the water flow into a culvert. This alleviated the flooding on the Bowers property, but resulted in backing up and pooling on the Kobza property.

Kobza sued for injunctive relief, alleging that the earthen berm was unlawfully built and obstructed the flow of the surface water.[10] The Kobzas

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5. 2016 NEB. LAWS L.B. 897.
6. *Hedging transaction authority for power agencies advances*, UNICAMERAL UPDATE (Feb. 25, 2016), http://update.legislature.ne.gov/?p=18683 (last visited Sept. 20, 2016).
7. 2016 NEB. LAWS L.B. 897(2).
8. Kobza v. Bowers, 868 N.W.2d 806 (Neb. Ct. App. 2015).
9. *Id*. at 810-11.
10. *Id.* at 811-12.

"also allege[d] that the Bowerses altered the natural course of the eastern drainageway by adding dirt fill, which moved the drainageway closer to the Kobza property line, endangering their property due to flooding in the event of a major rainfall."[11] The Bowerses counterclaimed, asserting that the Kobzas "unlawfully increased the flow of water by pumping ground water resulting in damage to the Bowers property."[12] The district court denied Kobza's claim, and Kobza appealed.[13]

The Nebraska Court of Appeals affirmed, holding that "[i]njunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner."[14] Kobza was not entitled to an injunction because the Bowerses' diversion of the ground water was not negligent, as "the injury to their property was caused by the increased volume of ground water they pumped from their dewatering well."[15] *Id.* at 124.

"Diffused surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow,"[16] and it may "be dammed, diverted or otherwise repelled, if necessary, and in the absence of negligence."[17] However, this rule does not apply "when diffused surface waters are concentrated in volume and velocity into a natural depression, draw, swale, or other drainageway."[18] When water has naturally found its way to, and is running in, a natural drainage channel or depression, a lower landowner cannot obstruct its flow.[19] If a lower landowner inhibits or alters a natural drainageway by building a structure across it, he has a "continuing duty to provide for the natural passage of that water through [the man-made] obstruction of all the waters which may be reasonably anticipated to drain therein."[20]

In this case, the water on the Kobza property was both surface and ground water. It was undisputed that after Kobza stopped using the

11. *Id.* at 811.
12. *Id.*
13. *Id.* at 812.
14. *Id.* at 813 (citing Romshek v. Osantowski, 446 N.W.2d 482 (1991)).
15. *Id.*
16. *Id.* (citations omitted).
17. *Id.*, (citing Nichol v. Yocum, 113 N.W.2d 195 (1962)).
18. *Id.*
19. *Id.*
20. *Id.*

dewatering well, water stopped ponding on both properties. Since there was no evidence that the surface water alone caused any problems, the rule from *Nichol* that would prohibit Bowers from obstructing the flow of water in a natural drainage way did not apply.[21] Under Nebraska common law, "lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainageways. A lower estate is not, however, under a natural servitude to receive diffused surface waters which have not found their way into a natural drainageway."[22] Here, the Court found no difference between ground water and surface water and analyzed both as a common enemy. The Court concluded that the Bowerses, as the lower proprietors, were free to dam the ground water, as long as the damming thereof was necessary, in the interests of good husbandry, and was reasonable under the circumstances.[23]

21. *Id.* at 814.
22. *Id.* (citations omitted).
23. *Id.*